These notes refer to the Armed Forces Act 2001
(c.19) which received Royal Assent on 11 May 2001

ARMED FORCES ACT 2001

EXPLANATORY NOTES

THE ACT - COMMENTARY ON SECTIONS

Part 3 – Trial and Punishment of Offences

Sections 17 to 30

56. This part of the Act contains a number of largely unconnected provisions concerning the administration of justice in the armed forces. The overall aim in reviewing the system was to check whether there were areas in which it might be changed either to reflect developments in the civilian system or to meet the Services' own requirements more effectively. The five yearly Armed Forces Acts are the principal means for effecting any changes that require primary legislation.

Section 17: Summary dealing or trial and functions of the prosecuting authority

57. Section 17 introduces *Schedule 1*.

58. One of the main changes made by the Schedule is to the provisions for summary proceedings against officers. Most disciplinary matters in the armed forces are dealt with summarily by the accused's commanding officer. The alternative is trial by court-martial. In the Army and RAF a case against an officer can only be dealt with summarily by an officer superior in rank to the commanding officer, known as an appropriate superior authority but, prior to this Act, officers in the Royal Navy could not be dealt with summarily at all. In the Army and RAF, only officers of ranks up to and including major/squadron leader could be dealt with summarily.

59. These limitations meant that, in the Royal Navy, court-martial trials were necessary for all offences alleged against officers, however minor the offence. A review of these procedures led to the changes in this Act, which will enable officers in the Royal Navy to be tried summarily. This applies to officers up to and including the rank of commander. To ensure that there is a degree of uniformity across the Services, the most senior ranks capable of being dealt with summarily in the Army and Royal Air Force will now be those Services' equivalents of commander, i.e. lieutenant colonel and wing commander respectively (paragraphs 1 and 5 of the Schedule).

60. Paragraphs 9 and 12 of the Schedule set out requirements as to the rank of any commanding officer or appropriate superior authority responsible for the summary trial of an officer in the Royal Navy. A commanding officer or appropriate superior authority hearing such a case is to be of the rank of commander or above and at least two ranks higher than the accused. The effect of paragraph 10 is that where these requirements are not met by the commanding officer, the case will be tried by an appropriate superior authority. Paragraph 13 amends the regulation-making power to allow further provision to be made about appropriate superior authorities.

61. The main effect of paragraph 11 is to give officers in the Royal Navy facing summary trial the right to elect to be tried by court-martial instead.

62. Elsewhere, the Schedule (particularly paragraphs 3, 7 and 14) closes a gap in the procedures. Previously, once a case was referred from the commanding officer and higher authority to the Service prosecuting authority, there was no statutory mechanism for the case to be referred back for disciplinary action if, in the view of the prosecuting authority, the case was unsuitable for trial by court-martial. The new provisions in this Schedule provide such a mechanism, which may be applied to part or all of a case. If a reference back is made, the commanding officer is then to consider the case afresh.

63. Schedule 1 (paragraphs 4, 8 and 15) also gives a power to the Service prosecuting authorities to advise police forces on all matters relating to offences under the SDAs. The Service prosecuting authorities perform functions akin to those of the Crown Prosecution Service (CPS), in deciding whether cases should be brought to trial and in being responsible for the conduct of prosecutions. The CPS also advises police forces on matters such as the evidence that will be needed to justify a particular charge. The CPS power is conferred by section 3(2)(e) of the Prosecution of Offences Act 1985. The new power of the Service prosecuting authorities provided by Schedule 1 is in very similar terms.

Section 18: Abolition of naval disciplinary courts

64. The Naval Discipline Act 1957 provided for the trial of naval officers of the rank of lieutenant commander or below by disciplinary courts in certain circumstances, particularly where the force with which the officer was serving was on active service. The purpose of such courts was to provide the facility to administer discipline quickly in such circumstances, in cases where only a relatively limited punishment was likely to be warranted - disciplinary courts could not award a punishment greater than dismissal.

65. A disciplinary court had never been convened under the Naval Discipline Act 1957. With the introduction of summary trial for naval officers (section 17), there is no further need to provide for them to be dealt with by disciplinary courts. Section 18 therefore removes this provision.

Section 19: Membership of courts-martial

66. Section 19 introduces *Schedule 2*.

67. Until now, only officers could sit as lay members (i.e. members apart from the judge advocate) of courts-martial of members of the armed forces (there is provision for civilians to sit as members where the accused is a civilian subject to the SDAs). Following a review of policy, it was decided that eligibility for court-martial membership should be extended, to allow substantive warrant officers (i.e. warrant officers who are not on only temporary promotion to that rank) to sit on the courts-martial of ranks subordinate to them. This was announced by the then Minister of State for the Armed Forces on 17 February 1998 (Commons Hansard Col 556).

68. This change required amendments to the SDAs, and this is the main effect of the Schedule. It adds references to warrant officers where, previously, only officers were mentioned, in the context of court-martial membership. Paragraphs 2, 9 and 16 set out the composition of courts-martial under the amended SDAs. The president of the court will continue to be an officer and, in cases where warrant officers are members of the court, they will not constitute a majority of the lay members.

69. The Schedule also provides that, where a warrant officer is subsequently commissioned, he will still be eligible to be a court-martial member as an officer, but only in trials where he could have sat before being commissioned, i.e. where the accused is below the rank held by the officer before receiving the commission. Like other officers, commissioned warrant officers will require a specified period of commissioned service before being eligible to be members of the generality of courts-martial.

Section 20: Eligibility of warrant officers for membership of summary appeal courts

70. Summary Appeal Courts were established on 2 October 2000, to hear appeals against summary proceedings under the SDAs. The courts consist of a judge advocate and two officers as lay members. There is no intention at present to alter the composition of the courts, but it is recognised that there may be a case for doing so, to enable warrant officers to be eligible. This will be kept under review in the light of experience with the new courts and also of warrant officers sitting as members of courts-martial (section 19).

71. Section 20 provides powers to extend eligibility for Summary Appeal Court membership to warrant officers by order. This will enable the Secretary of State, if he considers it desirable, to make this change without being required to wait for an opportunity to do so in primary legislation. The order would be subject to the negative resolution procedure. As with court-martial membership, section 20 limits the circumstances in which a warrant officer may sit on a Summary Appeal Court to cases where the appellant is of subordinate rank.

Section 21: Review of sentences by Courts-Martial Appeal Court

72. In the civilian criminal justice system, certain sentences imposed by the Crown Court may be referred by the Attorney General for review by the Court of Appeal, on the basis that he considers the sentence to be unduly lenient (section 36 of the Criminal Justice Act 1988). There was no corresponding power in relation to the sentences of courts-martial.

73. Section 21 confers such a power on the Attorney General. It inserts in each of the SDAs provisions enabling him, with the leave of the Courts-Martial Appeal Court (CMAC), to refer certain cases to that court. The main function at present of the CMAC, which comprises civilian judges from the Court of Appeal or its Scottish or Northern Irish equivalents, is to hear appeals on finding or sentence from courts-martial.

74. The new power largely mirrors that in the Criminal Justice Act 1988. It applies in respect of any offence tried by court-martial which could be tried by a civilian court only on indictment (i.e. by the Crown Court) and also to any offences specified by order. In cases referred to it, the CMAC will be able to substitute another sentence that would have been available to the court-martial.

75. One consideration in the Service system that does not apply in the civilian courts is that court-martial sentences are subject to review by the Service chain of command. The reviewing authority may not increase a sentence, but it may substitute one equivalent to or less severe than that imposed by the court-martial. This then becomes the sentence of the court and, under the amendments made by section 21, this (rather than the original sentence) would be subject to referral by the Attorney General in relevant cases.

76. Section 21 also provides that the outcome of the review by the CMAC may be the subject of an application to the House of Lords, by either the Attorney General or the accused, on a point of law.

Section 22: Required custodial sentences

77. This section introduces *Schedule 3*, which amends the SDAs to clarify how the rules about mandatory sentences are to apply to courts-martial. It also provides that Schedule 3 will only apply to offences committed after the commencement of those amendments.

78. Sections 109 to 111 of the Powers of Criminal Courts (Sentencing) Act 2000 provide for mandatory sentences in circumstances where an accused is repeatedly convicted of certain offences. Section 109 provides that anyone over 18 convicted of a second serious offence is to receive a sentence of life imprisonment unless the court is of the opinion that there are exceptional circumstances which justify not imposing such a sentence.

If the court imposes an alternative sentence, it must state in open court its reasons for doing so. The offences which this provision covers are listed in the section and include attempted murder, manslaughter, rape, robbery and carrying a firearm with criminal intent.

79. Sections 110 and 111 are similar in their application. They provide for minimum custodial sentences to be imposed where the accused is convicted of a third offence of class A drug trafficking or domestic burglary. In both cases, the court may vary the sentence if it is of the opinion that there are particular circumstances which justify doing so. Reasons for not imposing the minimum sentence must be given.

80. Paragraphs 1 and 2 of Schedule 3 replace the provisions about mandatory sentences in the Army and Air Force Acts with more detailed provisions equivalent to those mentioned above. Paragraph 3 inserts in each of those Acts provisions based on section 152 of the Powers of Criminal Courts (Sentencing) Act 2000, which allows a shorter sentence to be imposed where the accused has pleaded guilty to a class A drug trafficking offence or a domestic burglary.

81. Paragraph 4 makes clear that civilians who are subject to the SDAs and tried under the provisions of the Army or Air Force Acts may not be given an absolute or conditional discharge where they are tried for one of the offences attracting a mandatory sentence, unless the court is of the opinion that there are circumstances (as described above) which justify not imposing a mandatory sentence.

82. Paragraphs 5 to 7 replace the provisions about mandatory sentences in the Naval Discipline Act with more detailed provisions equivalent to those mentioned above.

Section 23: Restriction of judicial review of courts-martial

83. In the civilian system, the High Court's powers of judicial review over the Crown Court are limited, so that it is unable to review the Crown Court's jurisdiction in matters relating to trial on indictment (section 29 of the Supreme Court Act 1981). Appeal to the Court of Appeal (Criminal Division) is considered the appropriate way of obtaining a remedy in relation to a decision made in such a trial.

84. Section 23 of this Act extends this restriction on the High Court's powers of judicial review to court-martial proceedings, by amending the 1981 Act. The restriction applies to two types of court-martial proceedings. The first, corresponding to that applicable to Crown Court proceedings, relates to court-martial trials of offences. The second applies to courts-martial hearing appeals from Standing Civilian Courts. Where a court-martial hears an appeal, there is a right of further appeal to the Courts-Martial Appeal Court, making the availability of judicial review unnecessary.

Section 24: Offences in relation to courts-martial etc.

85. The SDAs make it an offence for anyone subject to Service law to refuse "to produce any document in his custody or control which a court-martial has lawfully required him to produce" (for example, section 57(1)(c) of the Army Act 1955). Section 24 of this Act extends this, so that a refusal to produce other things that are likely to be material evidence is also an offence.

86. The SDAs include similar provisions (for example, section 101(1)(c) of the Army Act 1955) in relation to persons not subject to Service law. If such a person refuses to produce a document when required to do so by a court martial, then the court-martial may certify that as a contempt, to be dealt with by the civilian courts. Section 24 extends this to apply to the refusal to produce other things as well as documents.

Section 25: Powers to compel attendance of witnesses

87. The failure of Service personnel and others who are subject to the SDAs to attend as a witness at a court martial, a custody hearing before a judicial officer or proceedings

of the summary appeals courts in response to a summons, is an offence under the SDAs. However, such a failure on the part of persons who are not subject to the SDAs could only be certified as a contempt, to be dealt with by the civilian courts (under, for example, section 101(1) of the Army Act 1955 - see note on section 24). This procedure did not directly address the immediate problem of proceedings being frustrated by the absence of a witness.

88. Section 25 deals with expected and actual failures to respond to witness summonses by persons not subject to the SDAs. It inserts new sections in each of the Acts, providing that a judicial officer or judge advocate may issue a warrant for the arrest of a witness (including someone who may be able to produce a document or other thing that is likely to be material evidence), if satisfied that the individual concerned is unlikely to attend or produce the evidence voluntarily or to respond to a summons to do so.

89. Section 25 also provides that the judge advocate at a court-martial may issue a warrant for the arrest of such a witness who fails, without any apparent just excuse, to attend the proceedings in response to a summons.

90. The section makes equivalent provision in relation to custody proceedings before a judicial officer and to hearings of summary appeals courts, and specifies who may issue arrest warrants in these cases.

91. The purpose of arrest is to ensure the attendance of the witness. Because the person arrested would not be subject to the SDAs, section 25 provides for the arrest to be carried out by a civilian police constable, not by the Service police.

Section 26: Provisions for orders as to costs

92. Under section 19 of the Prosecution of Offences Act 1985, a party to criminal proceedings in the civilian courts may be ordered to pay costs where unnecessary or improper action taken by him, or on his behalf, has resulted in another party incurring costs. There was no corresponding provision in relation to proceedings in Service courts. Section 26 of this Act enables such provision to be made.

93. The section enables the Secretary of State to make regulations providing for courts-martial, the summary appeals courts, the Courts-Martial Appeal Court and Standing Civilian Courts to make orders as to the payment of such costs. The regulations may allow the court to take account of any other costs orders which have been made and may deal with matters such as appeals against costs orders.

Section 27: Costs against legal representatives

94. Section 26 deals with costs orders made against a party to any proceedings. Section 27 empowers the same courts as are referred to in section 26 to make costs orders against the legal, or other, representative of a party to proceedings. Like section 26, section 27 corresponds to a power of civilian courts under the Prosecution of Offences Act 1985 (section 19A). An order under section 27 may be made if the improper, unreasonable or negligent action of a representative results in the other party incurring costs. This section requires the Secretary of State to make regulations providing for appeals against such orders.

Section 28: Provisions supplementary to sections 26 and 27

95. In the civilian system, criminal prosecutions are brought by the Crown Prosecution Service (CPS). An example of the type of costs that the CPS might seek to recover, in an order analogous to that in sections 26 and 27, is the costs it had incurred for the travel and accommodation of witnesses. In the Services, the budgetary system means that the travel and accommodation costs of witnesses would be met by a budget other than that of the Service prosecuting authority, who is only an individual officer. Strictly speaking, therefore, prosecution costs are not incurred by the Service prosecuting authority but

by the Service itself. It is the Service, therefore, which is to be able to recoup the same types of costs which the other party could legitimately claim.

96. Section 28, accordingly, provides that costs incurred by the Services which result from the functions of the prosecuting authority as a party to the proceedings are deemed to have been incurred by the prosecuting authority. Regulations made under section 26 or 27 dealing with costs orders may identify the costs in question. Regulations under those sections may also specify the budgetary authority to be paid. The section also allows for any incidental provisions to be made in the regulations.

97. The regulations are to be made by statutory instrument subject to the negative resolution procedure.

Section 29: Custody

98. This section introduces *Schedule 4*, which concerns detailed aspects of the custody arrangements for those charged with offences under the SDAs.

99. Paragraphs 1, 3, 8 and 10 are all related. Previously, the SDAs provided that, once a trial had started, it was the judge advocate hearing the case who was responsible for reviewing the need for the accused to be held in custody, and for imposing conditions for release or ordering arrest, rather than a judicial officer (who is generally responsible for these matters before trial). However, trials may occasionally be adjourned for considerable periods. In these circumstances, the trial judge advocate may be assigned to another trial or be otherwise unavailable, and it would be more practical for the exercise of these powers to revert to a judicial officer. Paragraph 1 amends the Army and Air Force Acts and allows the trial judge advocate to order, on an adjournment, that these powers are be exercisable by a judicial officer, instead of by the judge advocate. Paragraph 3 is consequential on this. Paragraphs 8 and 10 have the same effect in relation to the Naval Discipline Act.

100. Once an accused has been charged, he may be released from custody subject to conditions to ensure his attendance at a hearing. There was no power in the SDAs to vary or discharge these conditions, although such a power is available in the civilian system. Paragraph 2 of the Schedule amends the Army and Air Force Acts to allow any conditions that have been imposed to be varied. Either party may apply for a variation. Paragraph 9 has the same effect in respect of the Naval Discipline Act. Paragraphs 5 and 11 of the Schedule amend the rule-making sections in the 1955 and 1957 Acts respectively, to allow the Secretary of State to make rules dealing with the procedure for applications to vary conditions.

101. Paragraphs 4, 6 and 7 of the Schedule concern Standing Civilian Courts, which deal with offences by civilians subject to the SDAs. (Because civilians are not generally subject to the SDAs in the United Kingdom, these Courts only operate overseas.) These provisions only apply to civilians connected with the Army and Royal Air Force. The Royal Navy does not have Standing Civilian Courts, because it is very rare for families of naval personnel to live with them on duty abroad. Paragraphs 6 and 7 insert a new Schedule (Schedule 1A) in each of the Army and Air Force Acts. These Schedules give Standing Civilian Court Magistrates powers to order an arrest or to deal with custody applications during a trial. The powers are similar to those available to judicial officers or judge advocates.

Section 30: Conditional release from custody

102. In the civilian system, a person who is appealing against conviction or sentence may apply to be released on bail pending the outcome of the appeal. There was no equivalent provision within the Service discipline system. Section 30 enables the Secretary of State by order to make such provision in relation to Service appeals.

103. An order under section 30 may apply to persons who are appealing from a conviction by a court-martial, a summary appeal court , a Standing Civilian Court or against a decision of the Courts-Martial Appeal Court. The section lists a number of matters which may be dealt with by order, for example, how and to whom an application for release may be made and the criteria to be applied when considering an application. It also provides for a power to make orders in relation to the arrest of those who fail to comply with conditions imposed on their release and the offences thus committed. Orders under this section will be made by affirmative procedure if they amend any Act and otherwise by negative resolution procedure (section 35).